

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 12,846

FILED SEP 27 1955

MEYER KLIG,

Joseph W. Stewart
CLERK

Appellant,

v.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE
UNITED STATES,

Appellee

BRIEF FOR APPELLANT

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JOHN B. BRUMBELOW,
DAVID CARLINER,
Of Counsel.

Questions Presented

1. Whether an alien who was a former member of the Canadian Communist Party when he entered the United States in 1941 and 1945 for permanent residence is subject to deportation:

(a) Where there is no proof in the administrative record that the Canadian Communist Party advocated the overthrow of all forms of law or of the Government of the United States;

(b) Where deportation proceedings were instituted in 1947 upon the basis of such past membership outside the United States.

2. Whether an alien who last entered the United States in 1945 can be deported under the Internal Security Act of 1950 (8 U.S.C. 137, 137-3, Supp. IV, 1946 Ed.) upon the ground that he was excludable in 1941 or 1945 upon the basis of former membership in the Canadian Communist Party prior to 1932.

3. Whether the exclusion provisions of the Internal Security Act of 1950 (8 U.S.C. 137, Supp. IV, 1946 Ed.) are prospective or retrospective in operation.

4. Whether this Circuit approves the ruling in *Berrebi v. Crossman*, 208 F. 2d 498 (C.A. 5, 1953) which is in conflict with the ruling below.

INDEX

	Page
Jurisdictional Statement.....	1
Statement of Facts	1
Statutes Involved	2
Summary of Argument	4
Argument	5
I. On this record appellant entered the United States lawfully in 1941 and 1945.....	5
(A) Exclusion of aliens prior to 1950 required proof of the nature of the aims of foreign communist parties	5
(B) The law prior to 1950 did not require the deportation of former members of foreign communist parties who were excludable....	7
II. Appellant is not deportable under the Internal Security Act of 1950 for former membership in a subversive organization outside the United States prior to 1950...	10
III. Appellant is not deportable under the Internal Security Act in view of the prospective application of its exclusion section..	12
Conclusion	14
Appendix	15

CASES

<i>Berrebi v. Crossman</i> , 208 F. 2d 498 (C. A. 5, 1953), 2, 5, 7, 9, 11, 12	
<i>Claridge Apts v. Commissioner of Internal Revenue</i> , 323 U. S. 141; 164 (1944).....	13
<i>Ex parte Fierstein</i> , 41 F. 2d 53 (C. A. 9, 1930).....	4, 6
<i>Kessler v. Strecker</i> , 307 U. S. 22 (1938).....	8
<i>Post v. United States</i> , 161 U. S. 583 (1896).....	13
<i>Standard Acc. Ins. Co. v. Miller</i> , 170 F. 2d 495 (C. A. 7, 1948)	13

STATUTES

Alien Registration Act of 1940, 54 Stat. 673; 8 U. S. C., 137 (1946 Ed.).....	3, 4, 7
--	---------

	Page
Anarchist Act of October 16, 1918, 40 Stat. 1012	3, 4, 7
Immigration and Nationality Act of 1952, 8 U. S. C. 1182(a)(28)(I); 1251(a)(6)	10
Internal Security Act of 1950, 64 Stat. 1006, 8 U. S. C. 137, 137-3, Supp. IV, (1946 Ed.)	2, 3, 10, 11

MISCELLANEOUS

H. R. 5138, 76th Congress	8
House Report 994, pp. 3, 6, 76th Congress, 1st Ses- sion	8
Senate Report 1721, 76th Congress 3d Sess.	9
Sutherland, Statutory Construction (1943)	13
86 Cong. Rec. 10360, 10363	6, 9

IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,846

MEYER KLIG,

Appellant,

v.

**HERBERT BROWNELL, ATTORNEY GENERAL OF THE
UNITED STATES,**

Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment in favor of appellee entered on June 7, 1955 (J.A. 39). The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1291.

Statement of Facts

Appellant, a native of Russia, was lawfully admitted to the United States for permanent residence on April 2, 1941

and was thereafter readmitted as a returning resident on December 18, 1945. Prior to July 1932, he was a member of the Communist Party of Canada (Pre-Trial Memorandum, J.A. 22). His membership lasted from 1929 to 1932 and it appears that he has been a person of good moral character at least for the past five years (J.A. 46).

On February 5, 1947, deportation proceedings were instituted against appellant upon the ground that his past membership in the Communist Party of Canada rendered him excludable on the occasions of his entries and accordingly subject to deportation (Exhibit 1 and Pre-Trial Memorandum, (J.A. 22, 40). No evidence was introduced in the administrative proceedings to establish the subversive nature of the Communist Party of Canada (J.A. 45). Nevertheless, the Board of Immigration Appeals directed deportation on January 2, 1953 upon the ground that appellant entered illegally in 1941 and 1945 in view of his past membership in a proscribed organization (J.A. 43).

The District Court acknowledged that the Fifth Circuit Court of Appeals had held under similar circumstances that an alien was not deportable *Berrebi v. Crossman*, 208 F. 2d 498 (C.A. 5, 1953). Nevertheless, the Court below dismissed the complaint on the theory that the Internal Security Act of 1950 (8 U.S.C. 137-3, Supp. IV, 1946 Ed.) required the deportation of aliens who were past members of the Communist Party outside the United States prior to 1950.

Statutes Involved

Section 22 of the Internal Security Act of 1950 (64 Stat. 1006; 8 U.S.C. 137, 137-3 Supp. IV, 1946 Ed.) amended the Anarchist Act of October 16, 1918 (40 Stat. 1012) and the Alien Registration Act of 1940 (54 Stat. 673) to read as follows:

(The Exclusion Section)

[Sec. 1, 8 U.S.C. 137). Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest . . .

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(A) Aliens who are anarchists; . . .

• • • • •

(C) Aliens who are members of • • • the Communist or other totalitarian party of • • • any foreign state • • •

• • • • •

(H) • • • • •

(The Deportation Section)

[Sec. 4a, 8 U. S. C. 137-3]. Any alien who was at the time of entering the United States or at any time thereafter, • • • a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

The Anarchist Act of October 16, 1918 (40 Stat. 1012) as amended by the Alien Registration Act of 1940 (54 Stat. 673) and as set forth in 8 U. S. C. 137 (1946) Ed. provided:

[Sec. 1] Any alien who, at any time shall be or shall have been a member of any one of the following classes shall be excluded from admission to the United States:

• • • • •

(C) Aliens who * * * are members of * * * any organizations * * * that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law * * *.

[Sec. 2]. Any alien who was at time of entering the United States or has been at any time thereafter, a member of any one of the classes of aliens enumerated in Section 1 of this Act shall upon warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

Summary of Argument

On the occasions appellant entered the United States for permanent residence in 1941 and 1945, his entries were lawful unless it was first established that he was a member of an organization which advocated the overthrow of all forms of law or the Government of the United States. *Ex parte Fierstein*, 41 F. 2d 53 (C.A. 9, 1930). The administrative record herein contains no evidence of this character. For this reason and because appellant was a former member of the Canadian Communist Party on the occasion of his entries, he was lawfully in the United

States prior to 1950. *Berrebi v. Crossman*, 208 F. 2d 498 (C.A. 5, 1953).

Appellant has been ordered deported under the Internal Security Act of 1950 (8 U. S. C. 137, 137-c Supp. IV, 1946 Ed.) upon the ground that he was excludable at the time of his entries in 1941 and 1945. This order is improper not only because former members of subversive organizations outside the United States who are presently here are not deportable under the 1950 Act. *Berrebi v. Crossman*, 208 F. 2d 498 (C. A. 5, 1953) but also because by its terms the Internal Security Act is prospective in operation and requires deportation only of those excludable after 1950 or those who became members of subversive organizations in the United States. Neither situation obtains here and the judgment below should therefore be reversed.

I

On This Record, Appellant Entered the United States Lawfully in 1941 and 1945

(A) *Exclusion of aliens prior to 1950 required proof of the nature of the aims of foreign communist parties.*

Appellant was admitted to the United States for permanent residence in 1941 and reentered in 1945 as a returning resident (J.A. 22). On the occasion of his entries the law in effect was the Anarchist Act of October 16, 1918 (40 Stat. 1012) as amended by the Alien Registration Act of 1940 (54 Stat. 673). These laws (8 U. S. C. 137, 1946 Ed.) provided for the exclusion of alien members of an organization advocating the overthrow of all forms of law or the Government of the United States by force and violence. We pass for later consideration whether past membership was a ground for exclusion in 1941 or 1945. Assuming *arguendo*, that it was, it was still neces-

sary to establish through testimony upon the administrative deportation record, that the Communist Party of Canada between 1929 and 1932 (Appellant's period of membership) advocated the overthrow of all forms of law or the Government of the United States. *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9, 1930). This is fortified by the legislative history of the Alien Registration Act of 1940. In presenting this legislation, Representative Reed, one of its sponsors said:

It was stated by the gentleman from Utah (Mr. Murdoch) on the floor a few minutes ago that an alien may come from Russia; that at the time he lived in Russia he may have been a member of the Communist Party; that he comes to America, and then pro facto, he would be deported because of his former affiliation with the Communist Party. *The bill does not say that.* To be subject to deportation under this bill he must have been a member of a party or an organization which advocated, not the overthrow of the Russian government but the Government of the United States. If that were a principle of the Communist Party while he was a member of that party in Russia, and he then and at that time advocated the overthrow of the Government of the United States, that in itself would be enough to deport him if he came over here; and it should be.

86 *Cong. Rec.* 10360 (Emphasis supplied).

It is not disputed that evidence of the aims of the Communist Party of Canada was not forthcoming in the deportation proceedings herein (J. A. 45). On the contrary, the Board of Immigration Appeals erroneously applied the exclusion provision of the 1950 Internal Security Act—which could only apply to those seeking admission

in 1950 or thereafter—to an alien who entered previously. The exclusion provisions of the 1950 Act read that aliens of designated classes “shall be excluded from admission.” Obviously, this is prospective and cannot cover one who entered prior to its effective date (Point III, *infra*).

The deportation section is restricted to those who were in the proscribed classes at the time of entering or who thereafter became a member of the proscribed classes. With reference to these two categories, aliens are deportable “irrespective of the time of their entry into the United States.”

We therefore submit, that appellant is in precisely the same situation as the alien in *Berrebi v. Crossman*, 208 F. 2d 498 (C. A. 5, 1953) who was a past member of the Tunisian Communist Party (1937) when he entered in 1948. There it was stipulated and found that the alien entered the United States lawfully in 1948. Here upon the record presented, no basis exists for any finding other than that appellant entered lawfully in 1941 and 1945.

(B) *The law prior to 1950 did not require the deportation of former members of foreign communist parties who were excludable.*

We shall show in Point II that only members of foreign communist parties applying in 1950 and thereafter are excludable under the 1950 Internal Security Act. This Act repeats the same language as the 1940 Act except that it dispenses with proof of the aims of the Communist Party. The Anarchist Act of 1918 as amended by the Alien Registration Act of 1940 provided that:

[Sec. 1] Aliens who at any time shall be or shall have been members of the following classes shall be excluded from the United States.

• • • • •

was not in class at time of entry.

did not become member after entry.

Senate Rep 1154

1154-
2

Sen Rep 1721

Sen Rep 1795

8

(C). Aliens who are members of * * * any organization * * * that * * * advocates * * * the overthrow by force and violence of the Government of the United States or of all forms of law.

[Sec. 2]. Any alien who was at the time of entering the United States or has been at any time thereafter a member of any one of the classes of aliens enumerated in section 1 of this Act shall * * * be * * * deported. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

The 1940 amendment of the Anarchist Act of 1918 was adopted primarily to overcome *Kessler v. Strecker*, 307 U. S. 22 (1938) and to provide for the deportation of aliens who had been members of the Communist Party *within the United States*, regardless of the date of their entry. *House Report 994*, 76th Congress, 1st Session.

It will be observed that unless the 1940 Act requires the deportation of past members of subversive organizations *prior to entry*, neither does the 1950 Act.

Originally *H. R. 5138*, 76th Congress provided in both its exclusion and deportation sections (sections 1 and 2) as follows:

It being the intent and purpose of this Section that membership in any one of such classes, of no matter how short duration or how far in the past, shall prevent admission "and require deportation". (*House Report*, 994 pp. 3, 6, 76th Congress, 1st Sess.).

These provisions required the deportation of former members of proscribed groups outside the United States. They provoked vigorous criticism in the House of Representatives. Congressman O'Connor observed:

Does not the gentleman believe a man ought to be forgiven his sins? Does the gentleman want to deny Christianity? * * * Are we going to legislate against the teachings of the Man from Gallilee? 86 *Cong. Rec.* 10363.

Congressman Murdoch in a like vein stated:

Mr. Chairman, have we come to the point in the United States where we, in my opinion, not only depart from Americanism but depart in that language from Christianity? * * * One of the great underlying principles of Christianity is that if a man wants to repent, Christianity forgives him; but this language does not, it condemns him eternally. 86 *Cong. Rec.* 10363.

The Senate Committee believed that the language of the bill requiring the deportation of former members of proscribed organizations outside the United States would visit excessive hardship upon those entering the United States. Accordingly, it deleted the objectionable provisions of the bill. In explaining its action the Senate Committee said:

This is a provision of existing law, and prevents admission to certain classes of aliens, who are anarchists, or believe in overthrow of the Government, or the necessity of assassination of Government officers. The amendment of the Senate Committee striking out section 2 and inserting the language of existing law, was thought necessary to prevent hardship on aliens who may have, in the distant past, but who had renounced before coming to the United States, their membership in such classes." (Emphasis supplied). *Senate Report 1721, 76th Cong. 3d Sess.*

This demonstrates the concern of Congress for hardship in the case of former members of Communist Parties outside

the United States. Such membership was obviously not considered as harmful to our interests as former membership in the Communist Party in the United States.¹ It reinforces the conclusion in *Berrebi v. Crossman, supra*, that Congress intended to differentiate between exclusion and deportation in the case of aliens whose former membership occurred outside the United States. In the light of this we submit that the *Berrebi* case correctly reflects the law both as it existed under the 1940² and the 1950 Acts. Accordingly, appellant is not deportable under the 1940 Act which was supplanted by the 1950 Internal Security Act.

II

Appellant Is Not Deportable Under the Internal Security Act of 1950 for Former Membership in a Subversive Organization Outside the United States Prior to 1950

When Congress enacted the Internal Security Act of 1950, it copied the language of the Alien Registration Act but modified it by specifically naming the Communist Party. Accordingly, it carried forth the intent of the framers of the 1940 Alien Registration Act not to deport former members of the Communist Party outside the United States especially where they were in the United States in 1950, because of hardship on such individuals.³ Nevertheless, the Board of Immigration Appeals (J.A. 43, 45) and the District Court (J.A. 37) have affirmed appellant's deportation un-

¹ Compare the Immigration and Nationality Act of 1952 which likewise only forgives former membership outside the United States, 8 U.S.C. 1182(a)(28)(I), 1251(a)(6).

² Under the 1940 Act the administrative practice was not to deport an alien who came here prior to the Act and who was a former member of a subversive organization outside the United States.

³ The Internal Security Act of 1950 presents no independent legislative history on this subject.

der the 1950 Internal Security Act. To the contrary is *Berrebi v. Crossman*, 208 F. 2d 498 (C.A. 5, 1953).

The exclusion section of the Internal Security Act [Section 1 (2)] provides for the exclusion of an "alien who, at any time, shall be or shall have been members of any of the following classes:"

(A) Aliens who are anarchists

• • • • •

(C) Aliens who are members of • • • the Communist
• • • party of • • • any foreign state.

• • • • •

(H) • • •

The classes of aliens in subparagraphs A to H are set forth in the present tense and do not refer to past membership as does the introductory sentence. The deportation section of the Internal Security Act merely requires the deportation of "any alien who was at the time of entering the United States or at any time thereafter • • • a member of any one of the classes enumerated in Section 1(2)" [the foregoing section]. Congress could have said that any alien excludable under the Act should be deported. It did not but designedly, in the light of the history of the Alien Registration Act, merely referred to the classes in subparagraphs A to H, and it is only these classes and those who became subversives after entry who are deportable irrespective of the time of entry. This is the holding of *Berrebi v. Crossman*, *supra*, which states at 208 F. 2d 499:

A reading of the two sections indicates a legislative intent that a different test was to be applied to exclusion from that applied to deportation. If the petitioner

had been a member of the Communist Party of Tunisia at the time he gained admission into the United States, he would be subject to deportation now, and he would also have been subject to exclusion at the time of his entry. The deportation statute provides that any alien who at the time of entrance or at any time thereafter, was a member of the "classes of aliens enumerated in section 1 (2)" is subject to deportation. Therefore, it seems reasonable and proper to conclude that the reference to classes of aliens means the classes enumerated under section 1(2) in subparagraphs A through H, not to the section itself, which contains no enumeration of classes but specifically refers to "the following classes.

We submit that in the light of the legislative history of the Alien Registration Act from which the Internal Security Act was copied and upon the authority of *Berrebi v. Crossman, supra*, appellant has been improperly ordered deported under the Internal Security Act.

III

Appellant Is Not Deportable Under the Internal Security Act in View of the Prospective Application of Its Exclusion Section

Section 4 of the Internal Security Act (the deportation section) requires the deportation *inter alia* of an alien "who was at the time of entering the United States * * * a member of the classes enumerated" in section 1 (2) of the exclusion provisions. If these classes merely include those set forth in the subparagraphs A to H, then only present membership at the time of entry is a ground for deportation as noted in *Berrebi v. Crossman, supra*. If these classes refer to the entire section, then deportation is being directed for all aliens excludable under the 1950 Internal

Security Act. We are then confronted with the fact that the exclusion provisions should be read prospectively and not cover those who have already entered the United States. Obviously exclusion of an alien can only operate prospectively. An Alien can only be excluded when he seeks admission. An alien could only seek admission under the 1950 Act after 1950. Moreover, normally statutes are to have a prospective operation. The general rule is stated in 2 *Sutherland, Statutory Construction* (1943) p. 135 as follows:

Beginning with Kent's dictum in *Dash v. Van Keeck* [7 Johns 477 (N. Y. 1811)], it has been continuously reaffirmed that "The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear that it will admit of no other construction."

See also: *Claridge Apts. v. Commissioner of Internal Revenue*, 323 U. S. 141, 164 (1944) and *Standard Acc. Ins. Co. v. Miller*, 170 F. 2d 495 (C. A. 7, 1948).

The opening sentence of the exclusion provisions of the 1950 Act reads that aliens of designated classes "*shall be excluded from admission.*" This is a definite acknowledgement by Congress that aliens who entered prior to 1950 are not to be covered by the exclusion provisions of the Act.

In *Post v. United States*, 161 U.S. 583 (1896) a statute provided that "all criminal proceedings arising in the District of Minnesota . . . *shall be brought, had and prosecuted in the division of said district in which such offense was committed.*" In addition, the statute provided that "this act shall take effect upon its passage." The Supreme Court held that the statute operated prospectively and did not affect pending actions, stating at page 586:

Treating the direction as operating prospectively only, that "all criminal proceedings instituted . . . shall

be brought, had, and prosecuted" in a particular division, it *obviously includes all proceedings which shall be, and not which have been instituted . . .* all the proceedings for its prosecution, if instituted after the act of 1894 took effect, must be in the division in which the offense was committed; but if instituted before this act took effect, they might go on, as under the earlier acts, in any division. (Emphasis supplied).

We therefore submit that the exclusion provisions of the 1950 Internal Security Act operate prospectively. Appellant who last entered the United States in 1945 obviously was not excludable under the terms of the 1950 Internal Security Act. Deportation cannot therefore be grounded upon the basis that the appellant was excludable at the time of entry.

Conclusion

We submit, upon the basis of the foregoing that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

No. 12,846

JOINT APPENDIX

INDEX

	Page
Amended Complaint	17
Answer	20
Pre-Trial Memorandum	22
Motion for Preliminary Injunction	24
Findings of Fact and Conclusions of Law and Order ..	27
Transcript	28
Memorandum Opinion	37
Judgment	39
Notice of Appeal	40
Plaintiff's Exhibit 1	40
Plaintiff's Exhibit 2	44

APPENDIX**AMENDED COMPLAINT**

Filed November 5, 1954

The plaintiff, Myer Klig, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.).

2. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States, and supervises the administration of the Immigration and Naturalization Service and the Board of Immigration Appeals.

3. That the plaintiff is a native of Russia and was a naturalized citizen of Canada. He has lost his Canadian citizenship by six years residence in the United States and is stateless.

4. That the plaintiff was admitted to the United States for permanent residence on April 2, 1941.

5. That the plaintiff was last admitted to the United States on December 18, 1945, as a returning resident upon presentation of a resident alien's border crossing identification card.

6. That prior to July 1932 the plaintiff was a member of the Communist Party of Canada.

7. That since July 1932 the plaintiff has not been a member of or affiliated with the Communist Party of Canada or any other country.

8. That at the times the plaintiff entered the United States he was not a member of or affiliated with the Communist Party of Canada or any other country.

9. That at the times plaintiff entered the United States he was lawfully admitted to the United States for permanent residence.

10. That on or about February 5, 1947, the defendant, acting through his duly authorized agents instituted deportation proceedings against plaintiff upon the ground of his past membership in the Communist Party of Canada.

11. That thereafter a deportation hearing was accorded plaintiff on August 11 and 12, 1949, and on October 7, 1949.

12. That thereafter the immigration official presiding at the said hearing recommended plaintiff's deportation.

13. That the hearing was conducted by a presiding officer who was subject to the control and supervision of officials in the Immigration Service and in the Department of Justice who engaged in prosecuting and investigatory functions.

14. That the aforesaid presiding official engaged in prosecuting as well as quasi-judicial activities in connection with his duties as an immigration official.

15. That thereafter upon appeal, the Board of Immigration Appeals, acting for the defendant, directed that plaintiff be deported.

16. That in reaching the conclusion to deport plaintiff, the defendant, acting through his agents, considered matters outside the record of hearing which was available to plaintiff and his counsel.

17. Upon information and belief, that defendant maintains a separate confidential file concerning plaintiff which is not available to plaintiff or his counsel.

18. Upon information and belief, that defendant is in possession of confidential information relative to plaintiff which was not made available to plaintiff and his counsel.

19. That by reason of the foregoing, plaintiff was denied the rudimentary requirements of due process and elementary fairness, and the deportation hearing and order herein were null and void.

20. That in the deportation proceeding against plaintiff the evidence introduced did not establish by substantial evidence or otherwise that the Communist Party of Canada prior to July 1932 advocated the overthrow of the Government of the United States by force and violence or that said organization advocated the unlawful injury of property.

21. That the Board of Immigration Appeals ordered plaintiff's deportation upon his past membership in the Communist Party of Canada solely on the ground that he violated the Internal Security Act of 1950 at the time he entered the United States in 1945.

22. That the aforesaid interpretation by the Board of Immigration Appeals is contrary to the view of the General Counsel of the Immigration and Naturalization Service.

23. That the Board of Immigration Appeals, acting for the defendant, improperly interpreted the Internal Security Act of 1950 and improperly ordered plaintiff deported.

24. That the order of deportation herein does not specify the place to which the plaintiff is to be deported, and there is no country to which plaintiff may be deported.

25. That plaintiff is presently stateless, and no country is willing to receive him as a deportee.

26. That the order of deportation entered herein is vague, and null and void.

27. That the defendant has not accorded plaintiff a hearing as to the place to which he is to be deported nor does he intend to grant him such hearing, although requested to so do.

28. That plaintiff is not subject to deportation.

29. That he will not abscond and is not presently a danger to the public or security of the United States.

30. That defendant is threatening to take plaintiff into custody for the purpose of deporting him and unless restrained will do so, causing plaintiff irreparable injury.

31. That plaintiff is entitled to a permanent injunction against arrest until a place of deportation is ascertained.

WHEREFORE, plaintiff prays for judgment declaring that

(a) The deportation hearing herein was unfair, null and void.

(b) The deportation order herein was null and void.

(c) That the plaintiff is not subject to deportation.

(d) Restraining the defendant from taking plaintiff into custody and deporting him.

(e) For such other and further relief as may be appropriate.

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Of Counsel.

ANSWER

(Filed August 17, 1953)

First Defense

The complaint fails to state the claim upon which relief may be granted.

Second Defense

Answering the specifically numbered paragraphs of the complaint, defendant avers:

1. The allegations contained in paragraph 1 are admitted.
2. The allegations contained in paragraph 2 are admitted.
3. The allegations contained in paragraph 3 are admitted.
4. The allegation contained in paragraph 4 is admitted.
5. Defendant admits that the plaintiff was last admitted to the United States on December 18, 1945 as a returning resident. Defendant has insufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations contained in paragraph 5.
6. The allegation contained in paragraph 6 is admitted.
7. Defendant has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph 7.
8. Defendant has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph 8.
9. Paragraph 9 alleges conclusions of law which defendant is not required to answer. Insofar as he may be required to do so, he denies them.
10. The allegations contained in paragraph 10 are admitted.
11. The allegations contained in paragraph 11 are admitted.
12. The allegation contained in paragraph 12 is admitted.
13. The allegations of paragraph 13 are admitted. The defendant avers that the said presiding officer exercised his own independent judgment in conducting the hearing and rendering his decision in plaintiff's case, as required by existing regulations.
14. The allegation contained in paragraph 14 is denied.

15. The allegation contained in paragraph 15 is admitted.

16. Defendant denies the allegation contained in paragraph 16.

17. Defendant is not required to answer the allegations contained in paragraph 17 for the reason that they are immaterial to the issues of this case, but insofar as they may be deemed material, defendant admits that he maintains a file, as distinguished from the record of the deportation hearing, which is not available to plaintiff or his counsel, for the reason that all files and records of the Department of Justice are confidential.

18. Defendant is not required to answer the allegations contained in paragraph 18 for the reason that they are immaterial to the issues of this case, but insofar as they are deemed material, they are denied.

19. The allegations contained in paragraph 19 are denied.

20. Defendant denies the allegations contained in paragraph 20.

21. Defendant admits the allegations contained in paragraph 21.

22. Defendant is not required to answer the allegation contained in paragraph 22 for the reason that any views of the General Counsel of the Immigration and Naturalization Service as to the interpretation of applicable laws are confidential and for the use of the defendant and officers and employees of the Department of Justice.

23. Defendant is not required to answer the allegations contained in paragraph 23 inasmuch as they contain conclusions of law, but, insofar as they may be deemed not to be conclusions of law, they are denied.

24. The allegation contained in paragraph 24 is admitted.

25. The allegations contained in paragraph 25 are denied.

26. Defendant admits that plaintiff has not as yet been accorded a hearing as to the place to which he is to be deported, but defendant denies that he does not intend to grant plaintiff such a hearing on this matter.

27. Defendant is not required to answer the allegation contained in paragraph 27 inasmuch as it contains a conclusion of law, but, insofar, as it may be deemed not to be a conclusion of law, it is denied.

28. The defendant denies the allegations contained in

paragraph 28. Further, defendant avers that the outstanding order and warrant of deportation were ordered by the Board of Immigration Appeals, on June 12, 1953, to be withdrawn and the plaintiff to be permitted to depart from the United States voluntarily to any country of his choice. Such departure was to be effected in any event not less than thirty days from June 12, 1953, and under such conditions as the officer in charge of the particular District considered appropriate, conditioned upon consent of surety. Further, defendant avers that if plaintiff does not so depart from the United States in accordance with the permission granted as set forth above, it will be the duty of the defendant to take the necessary steps toward effecting the deportation of plaintiff.

Third Defense

Defendant avers that plaintiff has been accorded full and proper hearing on all matters relevant to this case, and further, that in no respect has there been a denial of due process of law in this connection.

WHEREFORE, Having fully answered defendant demands judgment plus the costs of this suit.

LEO A. ROVER,
United States Attorney.

PRE-TRIAL MEMORANDUM

(Filed November 3, 1954)

This is an action for declaratory judgment pursuant to 28 U.S.C. 2201 and 5 U.S.C. 1009 to review an order of deportation.

The plaintiff is a citizen of Russia and was naturalized as a citizen of Canada. He was admitted to the United States for permanent residence on April 2, 1941, and readmitted to the United States as a returning resident on December 18, 1945. Plaintiff admits that prior to July, 1932, he was a member of the Communist Party of Canada.

The pleadings establish that deportation proceedings were instituted on February 5, 1947, against plaintiff upon the ground of his past membership in the Communist Party and that deportation hearings were accorded him in 1949, culminating in a final order of deportation.

Plaintiff contends that he is not deportable for the following reasons:

1. The administrative record does not establish that the Communist Party of Canada advocated the overthrow of the United States Government, in 1932 or prior thereto.

2. Past membership was not a ground of exclusion at the time he entered in 1941 and 1945.

3. Upon the authority of *Berrebi v. Crossman*, 208 F. 2d 498 (C.A. 5, 1953), the deportation of plaintiff is illegal.

4. He was not accorded a fair hearing in conformity with the Administrative Procedure Act and due process.

Plaintiff also complains that the deportation order is void for failure to specify a place of deportation. He asserts that he is entitled to a permanent injunction.

Defendant asserts that plaintiff is deportable under the law by reason of past membership in the Communist Party of Canada, that plaintiff has been accorded a full and proper hearing upon all matters relevant to this case and that in no respect has there been a denial of due process of law. Defendant contends that the order of deportation is not required to specify the place of deportation and that plaintiff is not entitled to a permanent injunction.

Counsel for the parties agree that any official Government documents, either originals, photostats or carbons, may be introduced without formal proof, subject to objections as to relevancy, competency, and materiality. Plaintiff is given leave to amend his complaint and the parties are granted leave to move for summary judgment.

Dated November 3, 1954.

MATTHEW F. MCGUIRE,
United States District Judge.

JACK WASSERMAN,
Attorney for Plaintiff.

JOSEPH M. RYAN, JR.,
Assistant United States Attorney.

MOTION FOR PRELIMINARY INJUNCTION

Filed August 7, 1953

The plaintiff, by his attorneys, upon the complaint and other papers filed herein, moves the court for an order granting a restraining order and a preliminary injunction against defendant pending determination of this suit and until further order of this court, restraining defendant:

1. From apprehending plaintiff.
2. From deporting plaintiff, and
3. For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Bldg.,
Washington 4, D. C.

LEMUEL B. SCHOFIELD, ESQ.,
DAVID CARLINER, ESQ.,
Of Counsel.

AFFIDAVIT

DISTRICT OF COLUMBIA,
City of Washington, ss:

Jack Wasserman, being first duly sworn, deposes and says:

1. That he is one of plaintiff's attorneys in the above entitled action.
2. That the defendant has directed that plaintiff leave the United States on or about August 11, 1953 and if plaintiff does not do so, defendant will apprehend and attempt to deport him.
3. That on June 23, 1953 the instant action was instituted. That thereafter on July 17, 1953, counsel advised defendant's agents in the Immigration Service of the instant lawsuit and requested that an administrative stay of arrest and deportation be granted pending judicial consideration of the case.

4. That on August 4 and August 5, 1953, counsel had conversations with the General Counsel and Assistant General Counsel of the Immigration Service. Counsel was advised that an administrative stay would not be granted herein, that it was not the present policy of the Immigration Service to follow the case of *Rubinstein v. Brownell*, No. 11,683, C. A. D. C. June 11, 1953, and that the plaintiff herein would be apprehended for deportation unless an order of court restrained defendant.

5. Plaintiff is a native of Russia and was last a citizen of Canada. In all probability he has lost his Canadian citizenship by reason of his absence from that country. He is married to a citizen of the United States who is dependent upon him for support and has a citizen son, aged 20, and is gainfully employed. He was admitted to the United States for permanent residence in 1941 and made a reentry with proper documents in 1945. Deportation is sought because of past membership in the Communist Party of Canada prior to 1932. The complaint alleges, and the administrative record supports the fact that since 1932 he has had no affiliation with that party.

6. Judicial review is sought because it is believed that substantial questions are presented as to whether plaintiff is deportable. These points are discussed more fully in the Points and Authorities submitted herewith.

7. That if the defendant is not enjoined from proceeding under the order of deportation, plaintiff will be taken into custody and deprived of his liberty until such time as the proceeding has been determined.

8. That plaintiff will thereby be deprived of his ability to earn a living and support himself and his dependent wife and this court may be deprived of jurisdiction over the declaratory judgment action herein filed by plaintiff against defendant.

9. That plaintiff's removal from the United States will leave him without remedy.

10. That plaintiff has resided in the United States for approximately 12 years, has been a person of good moral char-

acter during this period, and has never been convicted of any crime in the United States.

11. That the plaintiff has not been during his residence in the United States hostile in any manner to the Government of the United States, has not been engaged in any subversive activity since 1932, and is not likely to engage in any criminal or reprehensible activities.

12. That because of plaintiff's past membership in the Communist Party in Canada prior to 1932, defendant sought to detain plaintiff during the administrative proceedings herein. In *U. S. ex rel. Klig v. Shaughnessy*, 94 F. Supp. 157 (D. C. S. D. N. Y. 1950) Judge Ryan held that there was "not a scintilla" of evidence to show that plaintiff might be a security risk. He also indicated that there was not even a suggestion that if enlarged upon bond plaintiff would not be available for further proceedings herein. 94 F. Supp. 157, 160. As a result, plaintiff was released upon a judicial bond of \$5,000. He has been at large upon said bond since November 17, 1950 and has at all times complied with the conditions thereof.

13. That it is doubtful whether defendant can find a country to which to deport plaintiff. Canada will not accept him as a deportee. Deportation to Russia is not practicable. Counsel believes that no country will be found to which plaintiff can be deported and that detention will serve no useful purpose except to inflict unnecessary and unwarranted punishment upon plaintiff in a civil proceeding.

14. That as plaintiff has a dependent wife, and is gainfully employed, his detention for any period will result in irreparable injury and damage to him and to his family.

Wherefore plaintiff prays that a restraining order and preliminary injunction issue enjoining the defendant from any action seeking to take plaintiff into custody or to remove him from the United States.

JACK WASSERMAN.

Subscribed and sworn to before me this 7th day of August, 1953.

ANNA A. HAMMOND,
Notary Public.

Comm. Exp. May 14, 1958.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW AND ORDER

Filed September 2, 1953

This cause having come on to be heard upon plaintiff's motion for a preliminary injunction restraining defendant from apprehending and detaining plaintiff pendente lite, and the Court, having considered the pleadings herein and having heard oral argument of counsel for plaintiff and defendant, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff herein has filed an action in this Court for a review of a final order of the Attorney General that the plaintiff be deported and for declaratory judgment that the deportation hearing was unfair, null, and void, that the deportation order is null and void, and that the plaintiff is not subject to deportation.

2. The plaintiff is at large under an administrative bond in the sum of ten thousand dollars (\$10,000.00).

3. The record before the Court discloses no reasonable basis for finding that the plaintiff's release upon bond will adversely affect the national security, public peace, or safety; or that the plaintiff will resume or follow a course of conduct which would make him deportable upon any additional grounds; or that the plaintiff will flee or hide.

4. Defendant has threatened to take the plaintiff into custody for the purpose of deporting him and unless restrained will do so.

5. Unless actions of the defendant are enjoined by this Court, plaintiff will be deprived of his liberty until the suit herein is terminated.

6. The deportation of the plaintiff before trial of the action herein will deprive him of judicial review of the administrative deportation proceeding and order and will result in irreparable injury to the plaintiff.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the instant action under the Declaratory Judgment Act (22 U.S.C. 2201) and under

the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. Plaintiff is entitled to a preliminary injunction restraining the Attorney General of the United States and his subordinates from apprehending, detaining, or deporting the plaintiff pending a hearing on the merits of the action herein, upon the authority of *Rubinstein v. Brownell*, United States Court of Appeals for the District of Columbia Circuit, Case No. 11,683, decided June 11, 1953.

Upon the basis of the foregoing Findings of Facts and Conclusions of Law, It is by the Court this 2 day of September, 1953,

ORDERED, ADJUDGED AND DECREED that the defendant, Herbert Brownell, the Attorney General of the United States, and his subordinates, clerks, and employees of every kind be and they hereby are restrained and enjoined from revoking plaintiff's bond of \$10,000.00, under which he is presently at large and/or from taking him into custody on a warrant of arrest for deportation pending final determination of this suit.

CHARLES F. McLAUGHLIN,
United States District Judge.

TRANSCRIPT

March 23, 1955

The above-entitled matter came on for hearing before the HONORABLE JOSEPH C. McGARRAGHY, Judge of the United States District Court for the District of Columbia, United States Court House, Third Street and Constitution Avenue, Northwest, Washington, D. C., commencing at 11:30 a. m.

APPEARANCES:

On behalf of Plaintiff: JACK WASSERMAN, Esq.
On behalf of Defendant: GEORGE HAMILTON, III, Esq.

PROCEEDINGS

The Deputy Clerk: Klig vs. Brownell, Civil Action No. 2846-53.

Mr. Wasserman: If Your Honor please, I would like

to begin by introducing two documents into evidence. Then we can combine the opening with the closing.

If you prefer that I make an opening statement, I will be happy to do so.

The Court: No, that is not necessary.

Mr. Wasserman: I have here two decisions of the Immigration Board of Appeals.

One dated January 2, 1953, which I would like to offer as Plaintiff's Exhibit 1.

(Document date 1/2/53, was marked as Plaintiff's Exhibit 1 for identification)

And the decision of the Board of Immigration Appeals, dated June 12, 1953, which I would like to offer as Plaintiff's Exhibit 2.

(Document date 6/12/53, was marked as Plaintiff's Exhibit 2 for identification)

The Court: Any objections?

Mr. Hamilton: Yes, Your Honor.

I have an objection to Exhibit No. 2, and I think in that respect, I should ask Mr. Wasserman for an offer of proof on that—the purpose for which he places that in evidence.

Mr. Wasserman: I place it in evidence for two reasons, Your Honor.

First, to show the last decision of the Board of Immigration Appeals in this matter; and secondly, to also indicate that the Board of Immigration Appeals has determined that the Plaintiff has been a person of good moral character for the past five years.

Mr. Hamilton: My objections are on the grounds of immateriality.

This man was deported for having been a Communist prior to his entry in the United States, and his moral character has no bearing on the decision of this Court.

The Court: The exhibits will be received.

(Plaintiff's Exhibits 1 and 2 for identification were received in evidence as Plaintiff's Exhibits 1 and 2.)

There was a preliminary restraining order. Was an appeal taken on that?

Mr. Wasserman: It was taken and then withdrawn.

Mr. Hamilton: That is correct. I believe it was a protective appeal.

Mr. Wasserman: We are in this position, Your Honor.

The Government does not have the Plaintiff's immigration file, and for that reason we agreed to permit Exhibit 1 to go into evidence, and also to stipulate as to the basic facts, because there is no dispute.

Will you stipulate that the Plaintiff entered the United States with proper documents for permanent residence in 1941, and was admitted by the Immigration Authorities at that time? That he subsequently made a trip to Canada, and was again admitted in 1945 as a returning resident?

Mr. Hamilton: I wonder if there is any way we can stipulate as to what he was admitted under. In other words, whether it was a visa? Does that appear in the opinion?

Mr. Wasserman: Well, it does not appear clearly in the opinion.

Oh yes, it does. He was admitted to the United States for permanent residence on April 2, 1941.

He was later admitted to the United States on December 19, 1945, as a returning resident.

In view of the facts that are in the Exhibit, I will withdraw the request.

Your Honor, the issue presented by this case is a very simple and a very narrow one.

First, I think I should tell you that this is a Declaratory Judgment Action to review a deportation order.

The Plaintiff was a member of the Communist Party of Canada for two or three years prior to 1932.

Thereafter, he ceased his association with any subversive organization, so far as the record shows, and as Exhibit 2 shows, the Board has found him to be a person of good moral character for the past five years or more.

He applied for proper documents in Canada in 1941, and was found admissible to the United States at that time.

The American Counsel in Canada issued a visa to him

and the Immigration authorities lawfully admitted him to the United States.

There is no indication that he obtained these documents by fraud, misrepresentation, or concealment.

Thereafter, he went to Canada on a short trip with a border crossing card, and was permitted to lawfully re-enter the United States.

Deportation proceedings were instituted in 1947 against the plaintiff upon the grounds that he re-entered the United States unlawfully because he was a past member of the Communist Party of Canada. And he has been ordered deported under the Internal Security Act of 1950.

The narrow, simple issue—although, to resolve it may be somewhat complicated—is, under these circumstances, he subject to deportation?

Now, I think Your Honor's task may be a little lighter for one very simple reason. There is a case in the Fifth Circuit which involves the exact same circumstances, and the Fifth Circuit held that the individual was not deportable under the Internal Security Act of 1950.

That case is *Berrebi vs. Crossman*, 208 Fed. 2nd 498. I have my advance sheet on that decision with the full text, if Your Honor cares to look at it.

The Court: I will look at it.

(Counsel handed document to the Court.)

Mr. Wasserman: That case holds that under the Internal Security Act, the language of the Internal Security Act states that while you can exclude such a person by reason of the membership in the Communist Party, once you are dealing with deportation—once he has been permitted to enter the United States with lawful documents, that then past membership in a foreign Communist Party is not a ground for deportation, because the Statute reads that the individuals to be deported are those who were members of the Communist Party at the time of entering, or thereafter, and this plaintiff was not a member of the Communist Party at the time of entry or thereafter.

The Court: He entered first in 1941?

Mr. Wasserman: That is correct.

The Court: And when did he re-enter?

Mr. Wasserman: In 1945.

That is the entire case.

The Court: Both times he entered, properly, as I understand it?

Mr. Wasserman: Both times he entered with proper documents.

He was permitted on the first occasion to enter with the sanction of the American Counsel and the Immigration authorities. On the second occasion, he was permitted to enter by merely having the sanction of the Immigration authorities, because when he left he secured what is known as a border crossing card, which authorizes you to go to Canada and come back into the United States.

Exhibit 1 specifically notes these facts.

The Court: Do you have the statute there, Mr. Hamilton?

Mr. Hamilton: Yes, Your Honor, I do.

This is a case of very simple statutory interpretation, but we have to go back and forth so many times, that I thought Your Honor might find this of use.

This is the Internal Security Act, and the pertinent section is Section 22—the first part of it—and subsection 4, on the following page.

Perhaps Your Honor would prefer to read the pertinent provisions first, and then I will—

(Counsel handed statute referred to above to the Court.)

The Court: Very well. I have read these.

Mr. Hamilton: Your Honor, there is one point I would like to straighten out. It was an unintentional misstatement.

It appears from the record that this man was deported for having been a Communist prior to his entry into the United States, and not as counsel said for having unlawfully entered the United States.

The question here is one of very narrow statutory interpretation, as Your Honor knows. However, I think it is necessary to go into the background a bit, of deportation, as generally set out in the opinion of Justice Jackson in *Harisiades v. Shaughnessy*—

The Court: Is this *Berrebi* case in point?

Mr. Hamilton: Yes, it is in point, but we feel it is distinguishable. I will point that out at the end of my argument.

In the *Harisiades* case, the Supreme Court had occasion to interpret the very statute which is now involved, and that citation is U. S. Reports 342, U. S. 598, I believe.

The Court: That is 342 U. S. 598?

Mr. Hamilton: Yes, Your Honor.

In that case, the Supreme Court indicated in footnote 15, that clearly the deportation provisions which Congress has set out are to be an aid of the exclusion proceedings.

The purpose of Congress is, if it can, to stop persons entering the United States at the borders; then once they pass those borders, to use these secondary enforcement proceedings by deportation.

Now, the intent of the 1940 Act, and particularly as amended by the Internal Security Act, was to clean out any Communists in the United States, and root out those who might possibly be, or are, or have been, Communists and exclude them from our borders in the public interest.

And this particularly is shown in the new Act, where this man is clearly deportable under the new Act.

Now, the interpretation of the Act is simply this: whether or not Section 4, referred to there, regarding the deportation of aliens includes the provisions of Section 2 under the first part of Section 22 in the Internal Security Act.

In other words, Your Honor, whether or not the provisions of Section 4 wherein it said that:

“Any alien who was at the time of entering the United States or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in Section 1 (2) of this Act, shall, upon the warrant of the Attorney General * * * ” etc.

Does that include the lead-off provisions of subsection 2, which provides (a) that aliens who at any time shall be, or shall have been, members of any of the following classes—and then (c) provides for members of the Communist Party of a foreign country.

Does that deportation provision simply include those words that start off "aliens who at any time . . ."

Now, it is clear from the foregoing statement regarding the *Harisiades* case and the intent of Congress, that certainly it wasn't intended that one who should surreptitiously sneak past the borders should have forever immunity from deportation.

If Congress provides for his exclusion at the time of entry, it follows that they should be deportable under the aid given by the secondary provisions of deportation.

It is clear that the majority of opinion in the *Berrebi* case supports the plaintiff's view. However, in the *Berrebi* case there was not one citation of authority.

In that case the Government had stipulated that this man had lawfully entered the country. That was a misapprehension of the law. In the first place, it was a conclusion of law, and in the second place, the Government urgently tells the Court that his man has illegally entered the United States, because clearly under the Internal Security Act, it provides that the Attorney General shall exclude those who had prior membership.

The Court: You mean that the visa given by the authorities in Canada was improperly given?

Mr. Hamilton: Improperly given to this man, and therefore the Court based its opinion on that basis.

I will hand this to Your Honor, or if Your Honor would prefer, I can read it at this time.

The Court: No, I will take it in chambers.

Mr. Hamilton: The Court in that case weighed heavily on the stipulation that he was lawfully admitted.

The Court: What do they say in this opinion about that?

Mr. Hamilton: About the *Berrebi* case?

The Court: No, in the decision of the Board of Immigration Appeals.

It has been stipulated by counsel that he was admitted in the United States for permanent residence in April 2, 1951—it doesn't go into the lawfulness of his entry.

How do we arrive at a determination as to whether or not he was lawfully admitted in 1941?

Mr. Wasserman: In my judgment, the only way it could be established that it was unlawful—his entry in 1941 was unlawful—would be if it were shown that the Communist Party of Canada advocated the overthrow of the government by force and violence in 1941.

The Internal Security Act was not in effect, and it was the Internal Security Act of 1950 which dispensed with proving the aims of the Communist Party.

The Court: I didn't mean to interrupt you, Mr. Hamilton.

Mr. Hamilton: In answer to your question, I would like to point Your Honor to the provisions of Section 4 (a):

"The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

So there can't be any serious argument as to whether he is under those provisions, and that Act provides that mere membership in the Communist Party is sufficient to base a deportation action on.

Your Honor, going back to the *Berrebi* case, the Court observed this:

"It is not only significant, but very persuasive, that the petitioner was lawfully admitted into the United States. At the time he presented himself for admission, the standards to be met were very strict. The stipulation compels us to conclude that the petitioner met all the requirements when he was lawfully admitted."

It goes on to say—

". . . the fact that he was lawfully admitted, and lived a law abiding life in this country thereafter, brings him within the different classification provided by law for an alien sought to be deported."

The Court didn't cite any authority for their interpretation of this. Their reasons were stated thusly:

"Therefore, it seems reasonable and proper to conclude that the statute has this meaning."

I think that this case indicates clearly the observation that has been many times made—that a bad case makes bad law.

That is my argument, Your Honor.

Mr. Wasserman: I would just like to go over the facts in the Berrebi case, so you can analyze them and compare them with this case.

In the Berrebi case, the appellant was a member of the Communist Party of Tunisia from 1937 to 1939. He was lawfully admitted into the United States for permanent residence in 1948.

Here the plaintiff was a member of a Communist Party sometime prior to 1932, and was admitted in 1941.

Now, all that can mean is the same thing that occurred here. In 1948, the law was no different than in 1941, or in 1945, when this plaintiff was admitted the second time.

What the Court is saying there, he was permitted to enter the United States for permanent residence with proper documents, which is exactly what occurred here.

If this plaintiff entered the United States unlawfully, you would have to conclude that Berrebi entered the country unlawfully.

What they are saying is, if you come into the United States and are admitted by the authorities for permanent residence, and there is no indication that there is fraud or misrepresentation, then you are lawfully admitted. And that is what happened here.

He was, in fact, lawfully admitted by the authorities. They considered his case an appropriate one for admission.

It points out at the time he presented himself for admission, the standards to be met were very strict.

The same thing applied in 1941 and 1945. Past membership in the Communist Party on both those occasions were grounds of inadmissibility, if there was proof in the record that the particular parties advocated the overthrow of the government of the United States by force and violence.

Now, Mr. Hamilton says that the statute—the Internal Security Act—is retroactive.

It is true that the statute does refer to the fact that the time of entry is immaterial. But the statute reads:

"Aliens who, at any time, shall be or shall have been members of any of the following classes:"

I interpret that to speak prospectively rather than retroactively.

They are not dealing with people who have already entered the United States—"shall be or shall have been"—they are dealing with people who shall attempt to enter in the future, and shall present the case of having been a present or past member of a foreign Communist Party, and for that reason I don't believe that this particular provision of the Internal Security Act applies here.

As I said at the beginning, I believe that this case is absolutely indistinguishable as a matter of law, as well as factually, from the Berrebi case.

The Court: Are there any other cases?

Mr. Hamilton: The Berrebi case is the only case on this point, as far as my research shows.

Mr. Wasserman: I know of no other case, and I might point out in that connection, the Harisiades case involved Communist Party membership in the United States, subsequent to entry. So you don't have the Berrebi or this situation there.

The Court: Thank you very much, gentlemen.

I will take the case under submission.

Mr. Hamilton: Thank you, Your Honor.

Mr. Wasserman: Thank you, Your Honor.

(Whereupon, the hearing was concluded at 12:25 p.m.)

* * * * *

MEMORANDUM

Filed May 31, 1955

Plaintiff is a former Communist who seeks relief from an Order of Deportation entered pursuant to the provisions of Section 4(a) of the Internal Security Act of 1950, 64 Stat. 1008, United States Code Congressional Service 1950, pp. 1001-1003, which reads as follows:

"Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

While conceding that he was at one time a member of the Communist party of Canada, the plaintiff contends that at the time he entered the United States he was not a member of or affiliated with the Communist party of Canada or any other country and, therefore, that he is immune from deportation under the provisions of the Act of Congress.

The plaintiff argues that Sec. 4(a) is limited to deportation of any alien who was at the time of entering the United States or has been at any time thereafter a member of any one of the classes of aliens enumerated in Section 1 of the Act, and since he was not at the time of entering the United States and has not been at any time thereafter a member of the communist party, he is not subject to deportation.

This contention ignores the provisions of Sec. (2)(c) which provides for the exclusion from admission into the United States of

"(2) aliens who, *at any time*, shall be or *shall have been members* of any of the following classes: (Under-scoring supplied)

"(C) Aliens who are members of or affiliated with * * * the communist or other totalitarian party * * * of any foreign state * * *".

In other words, the contention of the plaintiff is that while now he could be excluded from admission to the United States under the quoted provision, since he is already in the United States, he cannot be deported. This construction ignores the last sentence of Sec. 4(a), which reads as follows:

"The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

I believe that Sec. 4(a) which describes the classes of aliens which are deportable was intended to include the same classes which may be excluded.

Plaintiff, at the time of entering the United States, was an alien who had been a member of the communist party of a foreign state and is within the class now excludable under the provisions of Sec. (2)(C) quoted above. It seems to me that the only rational construction of the Act requires that the plaintiff should be held deportable.

In the case of *Berrebi v. Crossman*, 208 F. 2d 498, District Judge Allan B. Hannay reached a conclusion similar to that expressed in this memorandum. On appeal, the United States Court of Appeals for the Fifth Circuit, by a divided court, with Circuit Judge Russell dissenting, reversed. This appears to be the only reported case dealing with construction of Sec. 4(a) of the Internal Security Act of 1950.

It is my conclusion that the plaintiff is subject to deportation; that none of the other grounds alleged in the complaint are sustained by the record, and that the temporary restraining order entered herein should be dissolved and the complaint dismissed.

Counsel for defendant will prepare and submit an appropriate Order.

(S.) JOSEPH C. MCGARRAGHY,
Judge.

MAY 31, 1955.

JUDGMENT

Filed June 7, 1955

This cause having come on for trial and the Court having considered the evidence, heard argument of counsel for both parties and filed its Memorandum Opinion herein on May 31, 1955, it is this 7 day of June, 1955,

ORDERED that judgment be and it is hereby entered in favor of defendant plus the costs of the action, and it is

FURTHER ORDERED that the temporary injunction entered herein be and the same is hereby dissolved.

JOSEPH C. MCGARRAGHY,
Judge.

No Objection As to Form:

JACK WASSERMAN,
Attorney for Plaintiff.
Stay granted pending appeal.

(S.) JOSEPH C. MCGARRAGHY.

JUNE 7, 1955.

NOTICE OF APPEAL

Filed, July 5, 1955

Notice is hereby given that the plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia, from the judgment herein entered on June 7, 1955.

JACK WASSERMAN,
Attorney for Plaintiff.

Copy to be sent to:

LEO A. ROVER, Esq.,
United States Attorney

PLAINTIFFS' EXHIBIT 1

U. S. Department of Justice

Board of Immigration Appeals

January 2, 1953.

File: A-5277515—New York (2270-572057)

In re: Myer Klig or Myer or Meyer Klic or Kling or Myer Kleig or Joseph Kaufman or Josef Koffman

In Deportation Proceedings

In Behalf of Respondent: Lemuel B. Schofield, Esq., and John B. Brumbelow, Esquire, 1810 Morris Building, 1421 Chestnut Street, Philadelphia 2, Pennsylvania. (Mr. Brumbelow heard September 22, 1952)

In Behalf of Service: Sidney B. Rawitz, Service Representative. (Heard September 22, 1952)

CHARGES:

Warrant: Act of October 16, 1918, as amended—Prior to entry, alien affiliated with organization that believes in the unlawful damage, injury or destruction of property.

Lodged: Act of October 16, 1918, as amended—Prior to entry, alien who was member of Communist Party of Canada.

Application: Termination of proceedings

Detention Status: Released under bond

This case is before us on appeal from a decision of the Assistant Commissioner dated August 1, 1951, directing the respondent's deportation.

The respondent is a 48 year old male, native of Russia and last a citizen of Canada, who was admitted to the United States for permanent residence on April 2, 1941. He was last admitted to the United States on December 18, 1945 as a returning resident upon presentation of a Resident Alien's Border Crossing Identification Card. It was stipulated by counsel for the respondent and the Examining Officer that the respondent was a member of the Communist Party of Canada between 1929 and about July 1932. The Assistant Commissioner, in his decision, found it unnecessary to discuss the charge stated in the warrant of arrest and ordered the respondent's deportation on the charge lodged at the hearing.

Counsel concede that the facts in the respondent's case are entirely analogous to those in *Matter of D*, Int. Dec. 388, decided September 22, 1952. We there found the alien deportable on the same charge which was lodged against this respondent. However, counsel contend that *Matter of D* was incorrectly decided.

In the brief submitted by counsel and in the oral argument, it was contended that the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 does not authorize deportation of an alien whose membership in the Communist Party had terminated prior to entry and whose entry occurred prior to September 23,

1950. They refer to Section 4(a) which provides for the deportation of "any alien who was *at the time of entering the United States, or has been at any time thereafter*, * * * a member of any one of the classes of aliens enumerated in Section 1(2) of this Act", and rely on the underscored portion.

Counsel argue that while Section 1(2) of the Act of 1918, as amended *bars* from admission an alien who was at any time a member of one of the classes enumerated in paragraphs A to H, the word "classes mentioned in paragraphs A to H and does not include the opening clause of Section 1(2) which reads "aliens who, at any time, shall be or shall have been members of any of the following classes". In other words, the argument is that, under the Amendment made by the Internal Security Act, a person who was a member of the Communist Party of Canada and whose membership had terminated prior to his application for admission to this country can be excluded, but that the same person, if he succeeds in illegally entering the United States, is immune to deportation under Section 4(a). It seems inconceivable that Congress should have intended such a result and we must reject the interpretation of the statute which is proposed by counsel.

We hold that the reference in Section 4(a) to Section 1 (2) includes the following language of the last mentioned Section:

- (2) Aliens who, *at any time*, shall be or *shall have been* members of any of the following classes: * * *
- (C) Aliens who are members of * * * (iv) the Communist * * * Party * * * of any foreign state, or of any political or geographical subdivision of any foreign state; * * * .

Hence, under Section 4(a) the respondent is deportable since he is an alien who was at the time of entering the United States or thereafter a member of the aforementioned class. Support for our conclusions is found in the last sentence of Section 4 (a) which provides as follows: "The provisions of this Section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into

the United States." We believe that this can only mean that deportation is authorized whether the alien entered the United States before or after the passage of the amendatory Act of September 23, 1950. Prior to the amendment of the Act of 1918 by the Act of June 28, 1940, it was held that the statute authorized deportation only in the case of contemporaneous membership. By the amendment of June 28, 1940, deportation was made mandatory for all aliens who at any time in the past had been members of the proscribed organizations. The respondent's first entry in 1941 and his last entry in 1945 occurred after the passage of the 1940 amendment. As we indicated in *Matter of D*, supra, the subsequent amendment of the Act of 1918 by the Internal Security Act makes no material or significant change in the prior Act except specifically to provide that membership or former membership in the Communist party of the United States or of any foreign state should constitute a ground of exclusion or expulsion without the necessity of proving that such organization advocated the overthrow of the Government of the United States by force and violence.

We adhere to the view stated in *Matter of D*. When the respondent entered the United States in 1941 and 1945 he was excludable because of his past membership in a proscribed organization. The amendment of September 23, 1950 makes it unnecessary to this deportation proceeding to present evidence that the Communist Party of Canada was an organization proscribed by the 1940 amendment. For the foregoing reasons, we conclude that the respondent is deportable on the charge lodged at the hearing, and his appeal will, therefore, be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman.

PLAINTIFF'S EXHIBIT 2

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

June 12, 1953

(File: A-5277515—New York (2270-572057))

IN THE MATTER OF MYER KLIG
IN DEPORTATION PROCEEDINGS

In behalf of the respondent: Lemuel B. Schofield, Esquire, 1810 Morris Building, Philadelphia, Pennsylvania and Jack Wasserman, Esquire, Warner Building, Washington, D. C.

This case is before us on counsel's motion for reconsideration or reopening of the proceedings.

In our decision of January 2, 1953, we concluded that the lodged charge was sustained and that the respondent was deportable under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, on the ground that prior to his entry, he was a member of the Communist Party of Canada. He had been a member of that Party from 1929 until about July 1932 and last entered the United States on December 18, 1945. Counsel contends that the respondent is not amendable to deportation. He asserts that, in our previous decision, we relied on *Matter of D*, Int. Dec. 388, decided on September 22, 1952, and that in the latter case, we relied on *Martinez v. Neelly*, 197 F. 2d 462, affirmed 344 U.S. 516, rehearing denied 345 U.S. 931. Counsel contends that the Martinez case is inapplicable. In the *Matter of D*, *supra*, we referred to certain language in the Martinez case but our decision shows clearly that we were not relying on that case. On the contrary, in the *Matter of D*, we set forth fully our reasons for concluding that the alien was deportable, and in our previous decision in the respondent's case, the matter was again fully considered. In *Matter of L*, Int. Dec. 432, decided April 14, 1953, we again found an alien deportable under circumstances which were entirely analogous to those present in the respondent's case.

It appears to be conceded by counsel, if evidence had been presented establishing that the Communist Party of Canada advocated the overthrow of the Government of the United States by force or violence, then the respondent, by reason of his former membership in that organization, would have been excludable in 1945 under the Act of October 16, 1918, as amended June 28, 1940. Counsel contends that since such evidence was not presented, the respondent entered legally in 1945. When the Act of October 16, 1918, as amended June 28, 1940, was further amended by the Internal Security Act of 1950, no material or significant change was made except specifically to provide that membership or former membership in the Communist Party of the United States or of any foreign state should constitute a ground of exclusion or expulsion without the necessity of proving that such organization advocated the overthrow of the Government of the United States by force and violence.

While counsel indicated that the Service has held that members of the Nazi Party, who entered the United States prior to the enactment of the Internal Security Act of September 23, 1950, are not subject to deportation, that situation is not comparable to the respondent's case because, prior to September 23, 1950, there was no provision of law requiring the exclusion of members or former members of a totalitarian Party, whereas contemporaneous membership in an organization advocating the overthrow of the Government of the United States by force and violence has been a ground of exclusion since 1918 and even terminated membership in such an organization has been a bar to admission since the amendment of June 28, 1940. In view of the foregoing, we must reject counsel's contention, and we adhere to our previous decision that the respondent's deportability has been established.

Counsel also requests that the hearing be reopened to permit an application for discretionary relief although the nature of the relief desired is not stated. We had occasion to consider the same question in *Matter of L.*, *supra*. For the reasons stated in that decision, suspension of deportation cannot be granted to the respondent but we are not

precluded from granting voluntary departure which is the only discretionary relief available. There is nothing to indicate that the respondent has been other than a person of good moral character during the past five years and we still make the necessary finding that good moral character has been established. No useful purpose would be served in reopening the proceeding to permit the respondent to apply for suspension of deportation which cannot be granted because of the express terms of the statute, or to apply for voluntary departure which we are prepared to grant at this time. We are also of the opinion that the request for oral argument should be denied. We will therefore, enter the following order.

Order: It is ordered that the request for oral argument be and the same is hereby denied.

It is further ordered that the outstanding order and warrant of deportation be withdrawn and the alien be permitted to depart from the United States voluntarily without expense to the Government, to any country of his choice, within such period of time, in any event not less than 30 days, and under such conditions as the officer in charge of the District deems appropriate, conditioned upon consent of surety.

It is further ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed.

Chairman.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,846

MYER KLIG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

OLIVER GASCH,

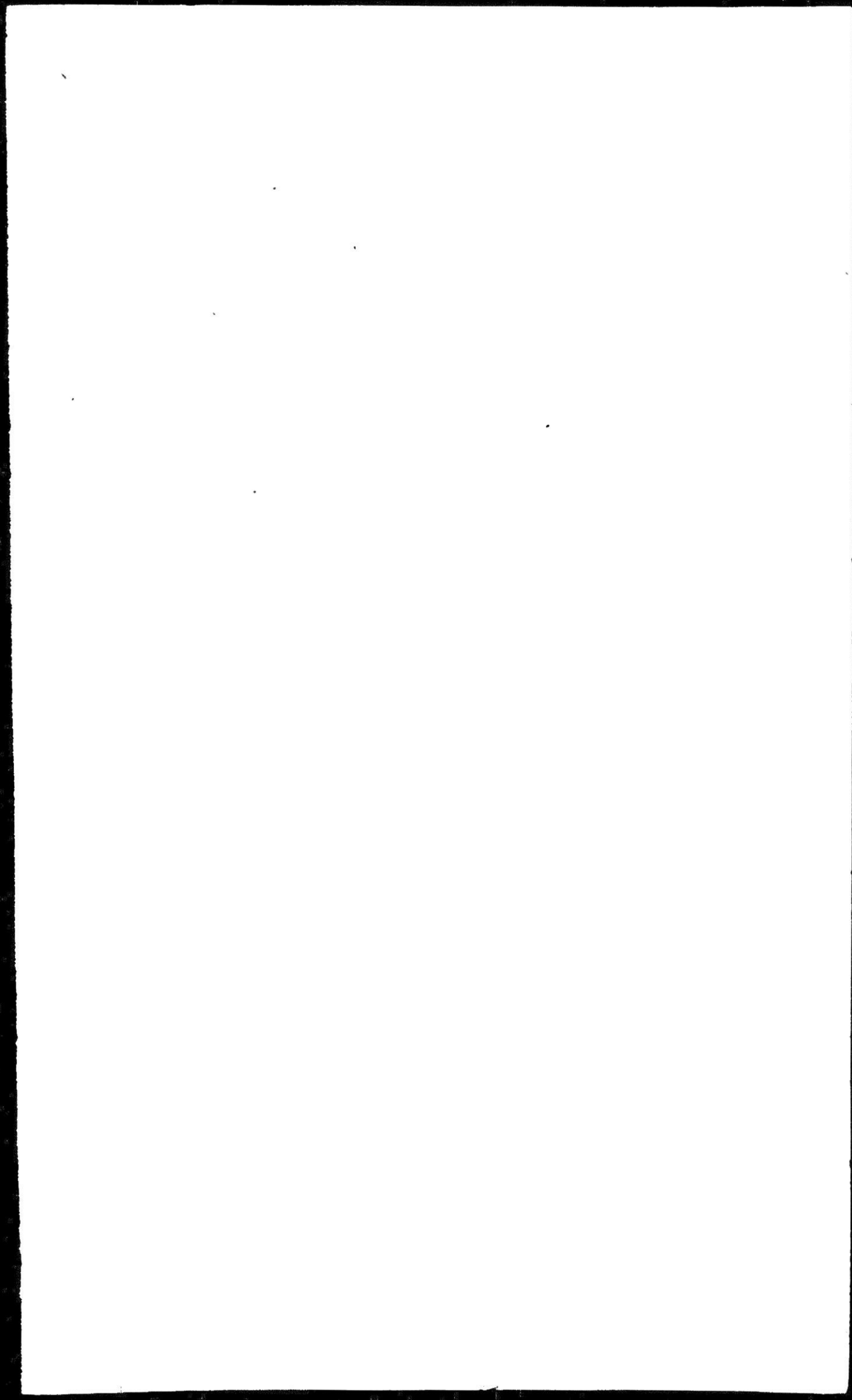
United States Attorney.

LEWIS CARROLL,

JOSEPH M. RYAN, JR.,

JOHN W. KERN, III.

Assistant United States Attorneys.



No. 12,846

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Whether appellee, acting through the Board of Immigration Appeals, correctly determined upon the basis of the plain language of the Internal Security Act of 1950 that appellant alien, who admittedly was a member of a class of aliens excludable from the United States pursuant to paragraph 2 of section 1 of the Act for the reason that he had been a member of the Communist Party of Canada prior to his entry into the United States, could be deported pursuant to section 4 of the Act which provides for the deportation of any member of any class of aliens excludable from the United States pursuant to paragraph 2 of section 1 of the Act?

INDEX

	Page
Counterstatement of the Case.....	1
Statutes Involved	4
Summary of Argument	4

Argument:

I. Appellant Alien Was Excludable Pursuant to the Applicable Section of the Internal Security Act of 1950 Because Prior to Entry He Had Been a Member of the Communist Party of Canada and as an Excludable Alien He Therefore Was Deportable.....	5
Conclusion	9
Supplement	10

TABLE OF CASES

<i>Berrebi v. Crossman</i> , 208 F.2d 498 (5th Cir. 1953).....	7
<i>Eichenlaub v. Shaughnessy</i> , 338 U.S. 521 (1950).....	7
<i>Galvan v. Press</i> , 347 U.S. 522 (1954).....	8
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952).....	6, 7, 8
<i>Kessler v. Strecker</i> , 307 U.S. 22 (1939).....	8
<i>Martinez v. Neelly</i> , 197 F.2d 462 (7th Cir. 1952).....	7

OTHER REFERENCES

H. Rep. No. 994, 76th Cong., 1st Sess. 6 (1939).....	8
Act of February 5, 1917, § 19(a), 39 Stat. 889-890.....	8

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,846

MYER KLIG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment entered by the District Court in favor of appellee upon an action for declaratory judgment brought by appellant seeking relief from an order of deportation by the Board of Immigration Appeals.

Appellant, a 48-year-old male, is a native of Russia and a naturalized citizen of Canada. He was admitted to the United States for permanent residence in April, 1941, and was re-admitted to the United States in December, 1945, as a returning resident upon presentation of a Resident Alien's Border Crossing Identification Card. Appellant admits that he was a member of the Communist Party of Canada from 1929 to July, 1932. Deportation proceedings were instituted against him in February, 1947, on the ground that he had been a member of the Communist Party of

Canada prior to his entry into the United States (J.A. 22, 41). Appellant was accorded deportation hearings in August and October, 1949, which resulted, in August, 1951, in a final order of his deportation by the Assistant Commissioner (J.A. 18, 22, 41).

Appellant appealed to the Board of Immigration Appeals, contending that the Anarchist Act of October 16, 1918, as amended by the Internal Security Act of 1950, did not authorize deportation of an alien whose membership in the Communist Party of a foreign country had terminated prior to entry into the United States and whose entry occurred prior to 1950 (J.A. 41, 42.) The Board cited section 4(a) of the 1950 Act which provided for the deportation of "any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in Section 1(2) of this Act." The Board then concluded (J.A. 42):

"We hold that the reference in Section 4(a) to Section 1(2) includes the following language of the last mentioned Section:

'(2) Aliens who, *at any time*, shall be or *shall have been* members of any of the following classes: . . . (c) Aliens who are members of . . . (iv) the Communist . . . Party . . . of any foreign state, or of any political or geographical subdivision of any foreign state;'

Hence, under Section 4(a) the respondent [appellant] is deportable since he is an alien who was at the time of entering the United States or thereafter a member of the aforementioned class. Support for our conclusions is found in the last sentence of Section 4(a) which provides as follows: 'The provisions of this Section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.' We believe that this can only mean that deportation is authorized whether the alien entered the United States before or after the passage of the amendatory Act of September 23, 1950. Prior to

the amendment of the Act of 1918 by the Act of June 28, 1940, it was held that the statute authorized deportation only in the case of contemporaneous membership. By the amendment of June 28, 1940, deportation was made mandatory for all aliens who at any time in the past had been members of the proscribed organizations. The respondent's [appellant's] first entry in 1941 and his last entry in 1945 occurred after the 1940 amendment."

The Board further concluded (J.A. 43):

"... the subsequent amendment of the Act of 1918, [as amended by the Act of 1940], by the Internal Security Act [of 1950] makes no material or significant change in the prior Act [of 1940] except specifically to provide that membership or former membership in the Communist party of the United States or of any foreign state should constitute a ground of exclusion or expulsion without the necessity of proving that such organization advocated the overthrow of the Government of the United States by force and violence . . . [This] makes it unnecessary to this deportation proceeding to present evidence that the Communist Party of Canada was an organization proscribed by the 1940 amendment."

In January, 1953, the Board dismissed appellant's appeal and affirmed the order of deportation (J.A. 43).

Appellant then moved the Board to reconsider and reopen his case, but the Board in June, 1953, adhered to its previous decision that appellant was deportable under the Anarchist Act of October 16, 1918, as amended by the Internal Security Act of 1950, on the ground that prior to his entry he had been a member of the Communist Party of Canada (J.A. 44, 45). Although the Board found that appellant had been of good moral character during the past five years, the Board pointed out that appellant was not eligible for suspension of deportation under the express terms of the statute, but was eligible for voluntary departure, which privilege the Board granted (J.A. 45, 46).

In November, 1954, appellant filed an amended complaint in the District Court for a declaratory judgment that the deportation order was invalid, that he was not subject to deportation and that appellee be restrained from taking him into custody and deporting him (J.A. 19). The District Court upon consideration of the evidence presented at the trial and the argument of counsel entered judgment in favor of appellee on June 7, 1955, and filed a memorandum opinion (J.A. 37-40). In such opinion, the District Court quoted Sections 1(2) and 4(a) of the Internal Security Act and concluded that the only rational construction of the Act was that appellant should be held deportable because of membership in a foreign communist party since the Act clearly excluded him (J.A. 39). Final judgment was entered in favor of appellee in June, 1955, and an appeal was noted in July, 1955 (J.A. 39-40).

STATUTES INVOLVED

The pertinent statutes are set forth in a supplement to this brief, *infra*. 10.

SUMMARY OF ARGUMENT

The Internal Security Act of 1950, amending the old Anarchist Act of 1918, provided for the exclusion of several classes or categories of aliens, including those aliens who, at any time, had been members of the communist party of any foreign country. Appellant alien admittedly had been a member of the Communist Party of Canada from 1929 through 1932 prior to his entry into the United States. Appellant alien was therefore an excludable alien. The Internal Security Act of 1950 also provided for the deportation of any alien who fell within any of the previously enumerated classes or categories of excludable aliens. Since appellant alien was excludable he was therefore deportable. Any other construction of the plain language of the Act would lead to results Congress could not have intended. Congress may deport, and indeed has deported, aliens from the United States on the sole basis of past conduct which Congress deems objectionable.

ARGUMENT

I

Appellant Alien Was Excludable Pursuant to the Applicable Section of the Internal Security Act of 1950 Because Prior to Entry He Had Been a Member of the Communist Party of Canada and as an Excludable Alien He Therefore Was Deportable.

The Board of Immigration Appeals, acting for appellee, determined in 1953 that appellant was deportable pursuant to Section 22 of the Internal Security Act of 1950 (64 Stat. 1006-1008), amending the old Anarchist Act of October 16, 1918 (40 Stat. 1012), as amended, on the ground that he had been a member of a class or category of excludable aliens—a member of the communist party of a foreign country prior to his last entry into the United States in 1945. A reading of the plain language of the applicable amendatory section of the 1950 Act is sufficient to show that this administrative determination was correct. Section 22 amends the prior statute by providing in its Section 1 that three classes of aliens are excludable and describes them in three separately numbered paragraphs: (1) those aliens who seek to enter the United States to engage in activities which, *inter alia*, would endanger American security; (2) those aliens who, at any time, are or have been anarchists or members of various proscribed organizations such as the Communist Party of the United States or the communist party of any foreign country; (3) and, those aliens about whom there is reason to believe that after entry they would be likely to engage in enumerated activities such as espionage or sabotage. Since appellant was an alien who had been a member of the Communist Party of Canada from 1929 through 1932 prior to his entry into the United States, he thus fell within the second class or category of excludable aliens defined in paragraph 2 of Section 1.

Section 4(a) (of the amendatory Section 22 of the 1950 Act) provides for the deportation of “[a]ny alien who was at the time of entering the United States, or has been at any time thereafter” a member of any of the classes of aliens

enumerated in the three paragraphs in Section 1. Appellant at the time of entry was a member of that class of aliens excluded under Section 1(2) for past membership in proscribed organizations since he had been a member of the Communist Party of Canada. Appellant was therefore deportable under 4(a) and the Board's order of appellant's deportation was correct.

Appellant would construe the deporting section—Section 4(a)—differently. He contends that the clause ordering deportation for “any alien who was at the time of entering the United States or at any time thereafter . . . a member of any one of the classes enumerated in Section 1(2)” restricts deportation to those aliens who were anarchists or members of the Communist Party of the United States or a foreign country at the time they entered the United States or to those aliens who became anarchists or members of the proscribed groups after they entered the United States. Appellant mistakenly interprets the meaning of the term “classes” as used in Section 4(a). Deportation is there prescribed for any alien who was at time of entry or became thereafter a member of any one of the classes enumerated in paragraphs (1), (2) and (3) of Section 1. But these paragraphs themselves are classes of aliens as the lead clause of Section 1 states. The term “classes” when used in connection with Section 1 clearly means groups of aliens as distinguished from the meaning of the term “classes” when used in paragraph 2 of Section 1 where it means organizations.

Furthermore, if appellant's construction of Section 4(a) were adopted, it would mean that an alien whose membership in a proscribed organization terminated prior to his application for admission into the United States would be excluded on the ground of such past membership, but if the same alien obtained entry in some way he would be immune to deportation. It seems unlikely that Congress could have intended such a result. It has long been recognized that the statutory provisions for deportation which Congress has enacted are to complement and to reinforce the exclusion sections. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588

(fn. 15) (1952). Indeed, as the District Court stated in the instant case, the only rational construction of these amendments made by the Act of 1950 required that appellant who had been a member of the communist party of a foreign state and was within an excludable class be held deportable. Appellant cites the case of *Berrebi v. Crossman*, 208 F. 2d 498 (5th Cir. 1953), wherein it was held that membership in the communist party of a foreign state prior to entry might be grounds for exclusion of an alien but such membership could not subject an alien to deportation. In the first place, there was a stipulation in the record in that case that the alien had been lawfully admitted into the United States and the court placed great stress on that fact. In the second place, the majority's opinion cited no authority to support its holding and consequent reversal of the trial court, but merely based its decision on its reading of the statute involved.

Appellant contends also that he was not within a class of excludable aliens at the time he entered in 1945 because the Act of 1950, barring aliens who had been members of the communist party prior to entry, was not in effect. At the time appellant's deportation hearings culminated in a final administrative order in 1951—followed by appeal to the Board in 1953—the statute in effect, and therefore applicable, was the Act of 1950. Appellant was excludable pursuant to the Act of 1950 and consequently deportable by the terms of the Act. Section 4(a) provided: "The provisions of this section [as to deportation] shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

It seems clear enough that Congress can prescribe grounds for exclusion or deportation based on past misconduct. See *Eichenlaub v. Shaughnessy*, 338 U.S. 521, 529 (1950); *Martinez v. Neelly*, 197 F. 2d 462, 465 (7th Cir. 1952). In providing for the exclusion and deportation of aliens who had engaged in objectionable activity outside the United States by being members of proscribed organizations Congress was not making any innovation in immigration law. A similar restriction precludes the entry and requires the

deportation of any alien who was convicted, or who admits the commission, at any time prior to entry, of a crime involving moral turpitude. See Act of February 5, 1917, § 19(a), 39 Stat. 889-890. Deportation under that statute is warranted for past infractions, even though reformation may have taken place before entry into the United States. See *Harisiades v. Shaughnessy*, *supra*, at 595. It is difficult to believe that Congress intended to bar and deport repentant criminals and to retain reformed subversives.

Finally, it may be noted that prior to 1940 the Anarchist Act of October 16, 1918, did not exclude aliens who had been members of proscribed organizations but had terminated such membership prior to entry. The old Act was amended in 1940 primarily "to meet the requirements indicated by the Supreme Court in the *Strecker* case." See H. Rep. No. 994, 76th Cong., 1st Sess. 6 (1939); *Harisiades v. Shaughnessy*, *supra*, at 593. *Kessler v. Strecker*, 307 U.S. 22 (1939) had determined that under the earlier statute deportation proceedings would not lie against an alien who formerly had been a member of the Communist Party within the United States. The amendments made by the 1940 Act and subsequently adopted and broadened by the 1950 Act, enabled immigration officials to deport any alien who had been a member of any organization within the United States—no matter how far in the past or for how short a time—which advocated the overthrow by force or violence of the government of the United States. The Act of 1950 dispensed with the need for proof of advocacy of violent overthrow of the Government, and made past membership in the Communist Party a basis for deportation. See *Galvan v. Press*, 347 U.S. 522, 529 (1954). Surely, there is little difference in principle between deporting an alien for past membership of no matter what duration in an organization within the United States advocating overthrow by force or violence of the Government and deporting appellant alien for past membership of substantial duration—four years—in an organization without the United States which organization the Congress in its best judgment has concluded seeks the overthrow by force or violence of the Government. The

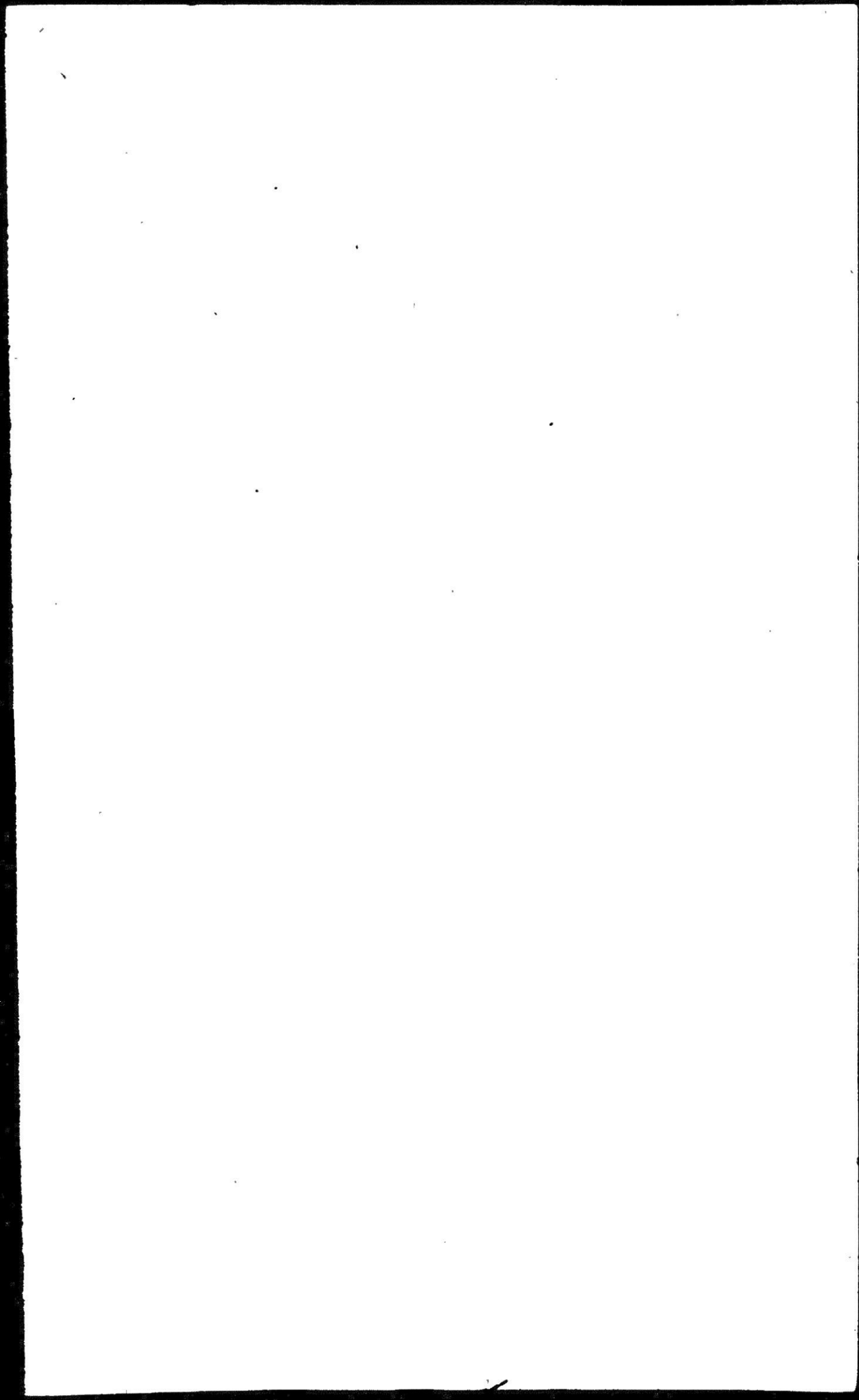
District Court correctly concluded that appellant alien was subject to deportation and correctly dismissed appellant's complaint.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.
LEWIS CARROLL,
JOSEPH M. RYAN, JR.,
JOHN W. KERN, III,
Assistant United States Attorneys.

SUPPLEMENT



SUPPLEMENT

STATUTES INVOLVED

1. The pertinent portions of the Anarchist Act of October 16, 1918, 40 Stat. 1012, are as follows:

"Sec. 1. That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or all forms of law; . . . aliens who are member of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, . . . shall be excluded from admission into the United States.

"Sec. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall . . . be taken into custody and deported in the manner provided in the Immigration Act of 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States."

2. The pertinent portion of the Act of June 5, 1920, 41 Stat. 1008, 1009, is as follows:

"That section 1 of the Act . . . [of October 16, 1918, 40 Stat. 1012] is amended to read as follows:

That the following aliens shall be excluded from admission into the United States: (a) Aliens who are anarchists;

* * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group that believes in, advises, advocates or teaches: (1) the overthrow by

force or violence of the Government of the United States or of all forms of law, . . .”

3. The pertinent portions of the Alien Registration Act of 1940, 54 Stat. 673, are as follows:

“Sec. 23. (a) The first paragraph of section 1 of the Act . . . [of October 16, 1918, 40 Stat. 1012], as amended, is amended to read as follows:

That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States.

(b) Section 2 of such Act of October 16, 1918, as amended, is amended to read as follows:

“Sec. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall . . . be taken into custody and deported in the manner provided in the Immigration Act of . . . 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.”

4. The pertinent portions of the Internal Security Act of 1950, 64 Stat. 1006-1008, are as follows:

“Sec. 22. The Act of October 16, 1918 [40 Stat. 1012], as amended . . . be . . . amended to read as follows: [Sec. 1.] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States;

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(a) Aliens who are anarchists;

• • • • •

(c) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . (iv) the Communist or other totalitarian party . . . of any foreign state, or of any political or geographical subdivision of any foreign state

• • • • •

(3) Aliens with respect to whom there is reason to believe that such aliens would, after entry, be likely to (a) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security . . .

• • • • •

Sec. 4 (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(1) or section 1(3) of this Act or . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of . . . 1917. The provisions of this section shall be applicable to the classes of aliens, mentioned in this Act, irrespective of the time of their entry into the United States."